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Supreme Court of the United States

KATHERINE KRAFT, Petitioner, —against— COMMISSIONER OF INTERNAL REVENUE, Respondent.	October Term, 1940 Petition and Brief No. 239

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI

Summary Statement of matter involved 1
Reasons relied on for the allowance of the writ 5
Prayer for writ 6

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts below 7
Jurisdiction 7
Statement of the case 8
Specification of errors 8
Argument 9

Point A—The retroactive effect of a new tax statute taxing the Petitioner for the income of the beneficiaries of the trusts here involved is an important question of Federal law which has not been settled by this Court 9

Point B—The decision of the Circuit Court of Appeals for the Third Circuit in this case is the decision of a Federal question in a way probably in conflict with applicable decisions of this Court 21

TABLE OF CASES CITED.

Corliss vs. Bowers, 281 U. S. 376, 74 L. ed. 916 16
Burnet vs. Wells, 289 U. S. 669, 77 L. ed. 1439 17
Eisner vs. Macomber, 252 U. S. 189, 64 L. ed. 521 21
Heiner vs. Donnan, 285 U. S. 312, 76 L. ed. 772 17
Helvering vs. Clifford, U. S. ; 60 S. C. 554, 84 L. ed. 504 (February 26, 1940) 8

PAGE

Helvering vs. Wood, U. S. ; 60 S. Ct. 551, 84 L. ed. 551 (February 26, 1940) 8
Hoeper vs. Tax Commissioner of Wisconsin, 284 U. S. 206, 76 L. ed. 248 ..... 11, 14
Lewellyn vs. Frick, 268 U. S. 238, 69 L. ed. 935 12
Lucas vs. Alexander, 279 U. S. 573, 73 L. ed. 851 20
Milliken vs. United States, 283 U. S. 15, 75 L. ed. 809 13
Ochoa vs. Hernandez Y Morales, 230 U. S. 139, 57 L. ed. 1427 19
Reinecke vs. Smith, 289 U. S. 172, 77 L. ed. 1109 16
Shwab vs. Doyle, 258 U. S. 529, 66 L. ed. 747 18
United States ex rel Attorney General vs. Delaware & Hudson Company, 213 U. S. 366, 53 L. ed. 836.. 11, 20
United States vs. Goelet, 232 U. S. 293, 58 L. ed. 610 11
United States vs. Hudson, 299 U. S. 498, 81 L. ed. 370 18
United States vs. Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061 ..... 11, 20
Welch vs. Henry, 305 U. S. 134, 83 L. ed. 87 12

TABLE OF STATUTES CITED.

Section 166, Revenue Act of 1928 ..... 10, 22
Section 166, Revenue Act of 1932 ..... 10, 22
Section 166, Revenue Act of 1934 ..... 10, 23
Section 1, Revenue Act of 1934 ..... 9, 22
Constitution of the United States, Article 1, Section 2, Clause 3 5
Constitution of the United States, Article 1, Section 9, Clause 4 5
Constitution of the United States, Fifth Amendment 4

TEXT BOOKS AND ENCYCLOPEDIAS CITED.

Harvard Law Review, Vol. 53, p. 1322 19

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Supreme Court of the United States

KATHERINE KRAFT, Petitioner, —against— COMMISSIONER OF INTERNAL REVENUE, Respondent.	October Term, 1940 Petition No.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner originally petitioned the United States Board of Tax Appeals for a redetermination of a deficiency income tax assessed against her for the year 1934 (R., p. 3, et seq.). The Board of Tax Appeals affirmed the deficiency (R., p. 82). Upon petition to the United States Circuit Court of Appeals for the Third Circuit for a review of the decision of the Board of Tax Appeals (R., pp. 82-83), the decision of the Board of Tax Appeals was affirmed April 16, 1940 (R., p. 92).

The deficiency arose because of the Respondent attributing to the Petitioner the income of five separate trusts created by Petitioner in prior years, one in 1930 and the others in 1932, solely by reason of the provisions of Section 166 of the Rev-

enue Act of 1934 (R., p. 13). Respondent has never claimed that the Petitioner was taxable under Section 22(a) of said Revenue Act. The trusts were revocable by the settlor upon certain conditions hereinafter fully described (R., p. 73), and unless sooner terminated by revocation were to terminate upon the death of either the settlor or the beneficiary (R., pp. 15, 25, 35, 46 & 59). Upon termination the corpus was to go to the settlor or to her estate if her death was the cause of termination (R., pp. 16, 26, 36, 46 & 59). The Petitioner was not the trustee under the trusts nor had she any power over the disposition of the income, nor prior to the setting up of the trust or thereafter was the Petitioner under any legal duty toward any beneficiaries of the trust. The beneficiaries under the five trusts were Petitioner's (1) brother-in-law, (2) brother, (3) two sisters, (4) adult daughter and (5) adult daughter (see 5 Trust Agreements, beginning at the following pages of the Record, respectively, pp. 14, 24, 34, 45 & 58).

Paragraph "Second" of the trust for Charles A. Kraft provided as follows:

> "SECOND,—The party of the first part shall have the right by an instrument in writing executed under her hand and seal and served on the Trustees at least five days before the expiration of any calendar year, to revoke this trust after the end of any such calendar year; the intent hereof being that the trust hereunder shall continue from year to year unless the party of the first part revokes same after the end of any such year, but that said power of revocation shall not exist or be in the party of the first part at any time during any calendar year but that same shall arise or come into existence only after the end of any such calendar year, nor shall there be power to revest in the party of the first part any part of the corpus of this trust during any such calendar year, but that

the latter power shall arise and come into existence only after the end of such calendar year" (R., p. 73).

Paragraph "Second" of the trust for Clarence Conklin provided as follows:

> "SECOND,—The party of the first part shall have the right by an instrument in writing executed under her hand and seal and personally served on the Trustees or mailed to the said Trustees at their last known addresses, at least five days before the expiration of any calendar year, to revoke this trust, in whole or in part, after the end of any such calendar year; the intent hereof being that the trust hereunder shall continue from year to year unless the party of the first part revokes the same, in whole or in part, after the end of any such year, but that said power of revocation shall not exist or be in the party of the first part at any time during any calendar year and that same shall arise and come into existence only after the end of any such calendar year, nor shall there be power to revest in the party of the first part any part of the corpus of this trust during any such calendar year, but that the latter power shall arise and come into existence only after the end of any such calendar year, except, however, that on the death of the shortest lived of the party of the first part and CLARENCE CONKLIN, this trust shall terminate immediately" (R., pp. 73-74).

The trusts for Phoebe and Mary Conklin, Dorothy B. Kraft and Edna May Kraft contained a paragraph "Second" identical with paragraph "Second" of said trust for Clarence Conklin hereinbefore set forth, except as to the name of the beneficiary (par. 8 of Stipulation, R., p. 74).

No notice of revocation was served prior to December 26, in 1933, and therefore no such notice could be served so as

to revest either principal or income of the trusts in Petitioner prior to January 1st, 1935. The trusts were in force for the whole of the calendar year 1934 and the respective beneficiaries of said trusts were entitled to and received the income therefrom for the entire year 1934 (R., p. 74, par. 9).

Section 166 of the Revenue Act of 1932 (Appendix, p. 22) provided that the income of revocable trusts was taxable to the grantor if "at any time during the taxable year" the settlor had the right to revoke the trust. The 1932 Act was in effect until after the opportunity of the settlor to revoke the trust for the year 1934 had passed in December of 1933, and the 1934 Act was not in effect until May 10, 1934 (R., p. 6). In the 1934 Act the words "at any time during the taxable year", found in the 1932 Act, were left out of the corresponding Section 166 (App., p. 23).

The questions involved are whether the 1934 Act retroactively effected a tax upon Petitioner for the 1934 income from these trusts paid to the beneficiaries, and if so, whether such Act is unconstitutional for the following reasons:

(a) That to tax the income of the beneficiaries from said trusts to Petitioner would deprive Petitioner of her property without due process of law in violation of the Fifth Article of Amendments to the Constitution for the United States of America;

(b) That to tax the income of the beneficiaries from said trusts to Petitioner would be a taking of Petitioner's private property for public use, without just compensation in violation of the Fifth Article of Amendments to the Constitution for the United States of America;

(c) That to tax the income of the beneficiaries from said trusts to Petitioner would be so arbitrary, whimsical and capricious as to impose a burdensome tax upon your Petitioner for income irrevocably vested in other persons and which your Peti-

tioner never received, as to amount to confiscation of Petitioner's property in violation of the Fifth Article of Amendments to the Constitution for the United States of America;

(d) That to tax the income of the beneficiaries from said trusts to Petitioner is to lay a direct tax upon her without being in proportion to the census or enumeration directed to be taken by Article I, Section 2, Clause 3, and by Article I, Section 9, Clause 4 of the Constitution for the United States of America and which census or enumeration is under said Articles, Sections and Clauses a condition precedent to said direct tax.

The Petitioner has from the beginning of this case before the Commissioner, before the Board of Tax Appeals (R., pp. 7-8) and in the Circuit Court of Appeals (R., p. 83) raised and relied upon these Constitutional provisions.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT:

I. The decision of said Circuit Court of Appeals, as to the application of Section 166 of the Revenue Act of 1934, by holding that the taxation of Petitioner for the income for the year 1934 of said trusts under said section does not deprive Petitioner of property without due process of law, does not take Petitioner's property for public use without just compensation and does not lay a direct tax upon Petitioner without being in proportion to the census or enumeration directed to be taken by Article I, Section 2, Clause 3 and by Article I, Section 9, Clause 4 of the Constitution of the United States of America:

(a) involves an important question of federal law which has not been but should be settled by this Court, i. e., a constitutional question.

(b) is the decision of a federal question in a way probably in conflict with applicable decisions of this Court.

II. The great importance of the income tax statute involved to the business world and to the legal profession and the need of an authoritative and elucidating decision as to the power of Congress to tax trust income to the grantor under an Act passed long subsequent to the time when the grantor had irrevocably given up for the year in question all power over not only the income itself, but also the corpus producing the income, especially when for a long period of time prior Acts specifically did not make such income taxable to the grantor.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals of the Third Circuit demanding said Court to certify and send to this Court a full and complete transcription of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 7212, *Katherine Kraft, Petitioner vs. Commissioner of Internal Revenue, Respondent,* to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Third Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, July 5th, 1940.

FRANK M. AVERY,
Counsel for Petitioner.